

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

DISK (11/10)
PLM-I

29398

FILE: B-214880

DATE: September 25, 1984

MATTER OF: Emma H. Welsh

DIGEST:

With the knowledge of her supervisors an employee voluntarily performed extra work at home in an effort to reduce a backlog of unprocessed travel vouchers. She is entitled to overtime pay computed under the Fair Labor Standards Act because her supervisors "suffered or permitted" the overtime at home. Since they did not induce her to work at home, she is not entitled to the greater amount of overtime compensation claimed under 5 U.S.C. § 5542, which requires that overtime be "officially ordered or approved."

Emma H. Welsh, an employee of the Department of Energy, is entitled to overtime compensation computed under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219, for work outside regular duty hours performed with the knowledge of her superiors. Her claim for additional amounts computed under 5 U.S.C. § 5542 is disallowed.

The claim submitted by Ms. Welsh covers the period from July 23, 1979, to August 24, 1980, during which time she was employed by the Department of Energy in the Payroll and Travel Operations Branch. The record indicates that during this period she performed work at home in an effort to reduce a backlog of unaudited travel vouchers. There is no dispute as to the fact that Ms. Welsh performed the work in question. In fact, the Department has accepted her documentation as showing that she performed 833 hours of additional work at home and found that she was entitled to overtime compensation of \$8,135.57 under the FLSA. This determination is based on the Department's finding that Ms. Welsh's superiors "suffered or permitted" her performance of the additional work within the meaning of 29 U.S.C. § 203(g).

Ms. Welsh claims that her superiors did more than "suffer or permit" her to work at home and she claims entitlement to compensation in excess of the amount determined to be due her under the FLSA. Specifically, she claims that the overtime work was "officially ordered or

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approved" within the meaning of 5 U.S.C. § 5542 and that she is entitled to "title 5" overtime of \$10,001.87 for the 833 hours she worked at home.

The distinction between "title 5" and FLSA overtime is important because overtime compensation is computed differently under the two authorities. Under the FLSA only those hours of work "suffered or permitted" in excess of 40 hours in a workweek are compensable as overtime. 5 C.F.R. §§ 551.401(a) and 551.501(a). Paid periods of nonwork (e.g., leave, holidays, or excused absences) are not included as hours of work for the purpose of determining FLSA overtime entitlement. See 5 C.F.R. § 551.401(b) and Frances W. Arnold, 62 Comp. Gen. 187 (1983). Under title 5, overtime is payable for work in excess of 8 hours a day that is "authorized or approved" and leave with pay is counted as hours of work for the purpose of computing overtime entitlement under 5 U.S.C. § 5542. 5 C.F.R. §§ 550.111 and 550.112(c). Since the Department of Energy has determined that Ms. Welsh was a nonexempt employee covered by the FLSA during the period of her claim, she is entitled to FLSA or title 5 overtime, whichever gives her the greater amount of compensation, provided the work in question is compensable as overtime under both authorities. 5 C.F.R. § 551.513.

The record before does not contain evidence of overtime "officially ordered or approved," the essential requirement for "title 5" overtime. Although there need not be an express order or approval, an authorized supervisory official must actively induce the employee to perform overtime. Inducement is shown if supervisory personnel require the employee to perform work that cannot be accomplished during regular working hours, schedule extra hours by placing the employee on a roster, or indicate that failure to work overtime will adversely affect the employee's performance rating. On the other hand, a supervisor's mere tacit expectation that extra hours will be worked falls short of overtime "officially ordered or approved." See John W. Gardner, B-175275.05, April 17, 1976; Baylor v. United States, 198 Ct. Cl. 331 (1972).

In the present case the claimant has furnished documentation showing that she performed additional work at home between July 1979 and August 1980, with the knowledge of her superiors. She has submitted a number of supervisors'

reports indicating an increased workload and a backlog of unprocessed travel vouchers and requests. Two such reports dated April 2, and May 28, 1980, near the end of the claim period, state that additional employees were then needed because travel vouchers were being processed at home, a practice that could not long continue. However, there is nothing to indicate that the supervisors ever expected Ms. Welsh to work at home, or led her to believe that her failure to do so would in any way be held against her. She evidently volunteered in the belief that her extra effort would be looked upon favorably and neither requested overtime compensation nor asked her supervisors if they required her to work extra hours at home to resolve the backlog problem.

The record shows only that the supervisors knew that Ms. Welsh performed work at home for the benefit of the agency and did not direct her to refrain from doing so. Under these circumstances, we can conclude no more than that her superiors "suffered or permitted" her to work overtime. Frances W. Arnold, 62 Comp. Gen. at 189-190. She is therefore entitled to be paid FLSA overtime compensation of \$8,135.57 and her claim for additional overtime compensation under 5 U.S.C. § 5542 is denied.

for 
Comptroller General
of the United States